90-1539

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PETER S. HERRICK
Petitioner

vs.

THE FLORIDA BAR
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

PETER S. HERRICK
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Pro Se
3520 Crystal View Court
Miami, Florida 33133
(305) 858-2332

QUESTION PRESENTED

Whether Disciplinary Rules 2-105 and 2-104(B)(1)(a) of the Florida Rules of Professional Conduct on their face and as applied to Petitioner violates the First and Fourteenth Amendments to the Constitution of the United States.

It is possible that 28 U.S.C. section 2403(b) may be applicable.

LIST OF PARTIES IN THE SUPREME COURT OF FLORIDA

The Florida Bar

Complainant,

Peter S. Herrick,

Respondent.

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REFERENCE TO OPINIONS OF THE SUPREME COURT OF FLORIDA

The opinion of the Supreme Court of Florida in reproduced in the appendix.

JURISDICTION

This Court's jurisdiction in the instant case is based on 28 U.S.C. section 1257 and United States Supreme Court Rule 10. This petition is timely filed.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Freedom of Speech phrase of the First Amendment to the United States Constitution states:

> "Congress shall make no law ...abridging the freedom of speech...."

The application of the Freedom of Speech of the First Amendment is set forth in the Fourteenth Amendment to the

United States Constitution which states:

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;..."

STATEMENT OF THE CASE

A. Factual Background

This case arises from a letter sent by Petitioner on his letterhead which stated:

July 26, 1985

Phillip & Barbara Reichendhol
10950 S.W. 93rd Avenue
Miami, FL 33176

Re: Customs Seizure
FL 7451 EA

Dear Mr. and Mrs. Reichendhol:

Customs seized a 1981 30'2" Formula Thunderbird, FL 7451 EA, and will forfeit the vessel unless a claim and bond for $2,500.00 is given to them by August 15, 1985. Our law firm specializes in Customs laws relating to vessel seizures. If you have any questions, please call.

With kindest personal regards.

Sincerely,

Peter S. Herrick, Esq.

The word "Advertisement" did not appear at the top of the page of the letter. The word "Advertisement" did not appear on the face of the envelope in which the letter was mailed.

The addressees of the letter were not present or former clients of the Respondent, and the letter was unsolicited.

Petitioner is not certified or designated in any area of law under the Florida Certification or Designation Plans. Customs law is not an area of law recognized for certification or designation under the respective plans.

B. The Course of the Proceedings

A complaint against the Petitioner was filed by the Respondent, The Florida Bar, on February 2, 1987, alleging violations of the Disciplinary Rules of

the Florida Code of Professional Responsibility. Count I alleges a violation of DR 2-104(B)(1). Counts II and III allege violations of DR 2-105.

On February 5, 1987, the Supreme Court of Florida assigned the Honorable Lawrence L. Korda, Circuit Judge, as referee.

Petitioner filed a motion to dismiss the complaint raising, among others, the constitutional issues, which was denied.

A hearing was conducted before the referee on April 29, 1987. Petitioner filed a Memorandum of Law addressing the issues of the constitutionality of the disciplinary rules which form the basis for the complaint. The State Bar filed its Memorandum of Law, to which Petitioner filed a Reply.

A copy of a proposed Report of

Referee was served on the Petitioner on February 4, 1988.

On July 6, 1988, the Referee, by order, directed the filing of memorandum of law as to the applicability of the U.S. Supreme Court's decision in Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988). Petitioner's Memorandum of Law was filed on July 18, 1988. The State Bar's Memorandum of Law was filed on July 15, 1988.

A Report of Referee dated August 11, 1988, was mailed to Petitioner by the referee on December 13, 1988, and received by Petitioner on December 17, 1988.

The Report of Referee was filed with the Supreme Court of Florida on December 15, 1988.

On December 21, 1988, Petitioner filed his Petition for Review.

On January 4, 1989, The Florida Bar moved to relinquish jurisdiction and remand the proceedings to the Referee for clarification of the Report of Referee. The motion was granted on January 5, 1989.

On January 11, 1989, Petitioner filed a Request For Findings of Fact and Conclusions of Law.

On February 25, 1989, Petitioner received a copy of the Report of Referee (Corrected) dated February 22, 1989.

The Report of Referee (Corrected) was filed with the Supreme Court of Florida on February 27, 1989.

On March 28, 1989, Petitioner filed his petition for review.

The Report of Referee (Corrected) made findings of fact as to Counts I, II and III, but stated no conclusions of law. The Report of Referee recommended

that Petitioner be found guilty as to all three counts as alleged in the complaint and recommended the imposition of a public reprimand. The Report of Referee did not specifically address the issue of the constitutionality of the disciplinary rules raised by Petitioner.

On October 11, 1990 the Supreme Court of Florida issued its decision upholding the referee's findings and issued a public reprimand.

On October 24, 1990 Petitioner filed a Motion for Rehearing and Clarification.

On January 3, 1991 the Supreme Court of Florida denied the Motion for Rehearing and issued a revised opinion. This decision became final on January 23, 1991.

REASONS FOR REVIEW

The U. S. Supreme Court has addressed a number of situations where States have attempted to restrict the Freedom of Speech of professionals who have attempted to inform the public of their services and experience. In the following series of cases the Supreme Court has struck down a number of these attempts: Bates v. State Bar of Arizona, 433 U.S. 350 (1977); In re R.M.J., 455 U.S. 191 (1982); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985); Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988); and, Peel v. Attorney Regulation & Disciplinary Commission, 110 S. Ct. 2281 (1990). The foregoing cases and the First Amendment protection offer compelling reasons to prevent The Florida Bar and the Supreme Court of Florida from

protecting Petitioner's rights to inform the public of his experience.

ARGUMENT

A. DISCIPLINARY RULE 2-105 OF THE FLORIDA RULES OF PROFESSIONAL CONDUCT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

1. Rule DR 2-105 and its historical development.

Disciplinary Rule 2-105 forms the basis of Counts II and III of the complaint of the Florida Bar. It is necessary, therefore, to determine the conduct prohibited by the rule and whether Respondent's conduct falls within the conduct thus prohibited.

Rule DR 2-105 provided:

Limitation of Practice

> **A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as follows:**
>
> (1) A lawyer who complies with the Florida Certification Plan . . . may inform the public and other lawyers of his

certified areas of legal practice.

(2) A lawyer who complies with the Florida Designation Plan . . . may inform the public and other lawyers of his designated areas of legal practice.

(3) A lawyer may permit his name to be listed in lawyer referral offices according to the fields of law in which he will accept referrals.

(4) A lawyer available to act as a consultant to or an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers or publish in local legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience, except as permitted under DR 2-105(1) or (2) above. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in local legal journals. (Emphasis added.)

Historically, DR 2-105, adopted in 1973, was amended in October, 1975, 319

So.2d 1, eliminating provisions for attorneys admitted before the United States Patent Office to use the designation of Patent or Trademark attorney, and for attorneys actively engaged in admiralty practice to use the designation Admiralty, on letterheads and office signs. Substituted therefor was a provision that a lawyer who complies with the Florida Designation Plan may inform the public of his designated areas of legal practice.

DR 2-105 was further amended effective July 1, 1982, 414 So.2d 490, to the form cited above, to provide for attorneys who comply with the newly created Florida Certification Plan, and eliminating a provision for attorneys certified as specialist by other state authorities. This opinion, dated May 20, 1982, does not expressly refer to or

discuss the implications of the prior decision of the U.S. Supreme Court in re R.M.J., 455 U.S. 191 (1982), decided January 25, 1982.

DR 2-105, between 1973 and 1982, through amendments, became increasingly more restrictive, eliminating even the public identification of the traditional areas of patent and admiralty law as areas of practice unless the lawyer was certified or designated under the Florida Plans in those areas.

2. Legal Standard Of Review To Be Applied.

The U.S. Supreme Court has adopted a four-part analysis in determining commercial speech cases:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.

> **Next, we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.**

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S., at 566.

The referee did not find that the Petitioner's statement in the letter, "Our firm specializes in Customs laws relating to vessel seizures," was untrue, false, fraudulent, misleading or deceptive. The statement, in fact, was true as established by the evidence.

The referee found in Section II, Findings as to Count II, Paragraph 2, that Petitioner's statement constituted a representation that Petitioner and/or his firm are specialists, having competence

or experience in a particular area of law. He further found as to Count III, Paragraph 4, that the publicly holding out that Petitioner practices in an area of law not recognized for certification or designation under the Florida Plans was improper.

3. DR 2-105 is a categorical prohibition of all forms of public communication of areas of practice, and limitations of practice, except in the limited circumstances provided.

(a) Conduct Prohibited by the Rule.

Every other lawyer, not certified, is categorically prohibited by this rule, on its face and as applied, from publicly identifying any area of practice, or publicly limiting his area of practice.

Except for the non-public means provided, the sweep of DR 2-105 was complete: For non-certified attorneys, all forms of public communications of

areas, or limitations, of practice were forbidden.

(b) Violation of Rule 2-105 is not depended solely upon the use of the word "Specialist"; Common Meanings of "Specialize" and "Specialist."

Petitioner used the word "specialize", not "specialist", in his letter. At first blush, one could assume they convey essentially identical meanings.

The referee found as to Count II, the representation that Petitioner "specializes" means that Petitioner is a "specialist, having competence or experience in a particular area of law."

This, however, is not the ordinary, common meaning of the word used by Petitioner.

Webster's New World Dictionary, Second College Edition (1976) defines "specialist" as "a person who specializes in a particular field of study,

professional work, etc." Webster's New Collegiate Dictionary (1974) defines "specialist" as meaning "one who devotes himself to a special occupation or branch of learning." By these definitions, the word does not mean "having competence or experience in a particular field" as the Referee found.

(c) "Specialize" Not Inherently Deceptive, False or Misleading.

It is important to observe that Petitioner is not charged by the Florida Bar of a violation of Rule DR 2-101(A), making false and misleading statements; nor is Petitioner charged with a violation of Rule DR 2-101(B)(4), stating or implying that he is certified or recognized specialist when he is not. He is charged with publicly identifying his field of practice, one which is not approved by the Florida Bar.

The use of the word "specialize" by Petitioner here was not deceptive, false or misleading. It truthfully conveyed that Petitioner concentrates his practice in Customs law; further, he has experience in Customs law acquired over a twenty-year period as an attorney as the evidence in this case established. To the extent "specialize" may be construed as conveying a representation of expertise, any such representation by Petitioner was true in this case.

The public identification of any area of practice by a lawyer reasonably may be viewed as implying that he has some experience or competency in that area of law. Any implied representation of experience or competence by identifying an area of practice, however, does not per se constitute an implied representation of certification in that

area of law or that the area of law is recognized for certification under the Florida Plans.

The conduct prohibited by this rule is clear. The conduct prohibited is not dependent upon the use of a specific word. DR 2-105, on its face and as applied in this case, operates as a categorical prohibition by the State of the constitutionally protected right of the Petitioner to truthfully identify publicly Customs law as an area of his practice. Bates v. State Bar of Arizona, 344 U.S. 350 (1977); In re R.M.J., 455 U.S. 191 (1982); Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988).

This rule also limits public identification of areas of practice to those which are recognized for certification under the Florida plans, further limiting such public

identification to those attorneys who are certified, and then only to the particular areas in which they are in fact certified.

Like the Missouri rule held invalid in In re R.M.J., 455 U.S. 191 (1982), this rule sweeps too broadly to be sustained consistent with the First and Fourteenth Amendments; it is squarely in conflict with the decisions of the Supreme Court in Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985); In re R.M.J., 455 U.S. 191, 71 L.Ed.2d 64, 102 S.Ct. 929 (1982); and Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Peel v. Attorney Regulation & Disciplinary Commission, 110 S. Ct. 2281 (1990).

In In re R.M.J., 455 U.S. 191 (1982), the Court invalidated a Missouri rule which, unlike DR 2-105, expressly permitted attorneys to publicly identify areas of practice, but which (like DR 2-105) limited such identification to a specific list and then permitted no deviation from the phraseology prescribed in the rule. The Missouri rule, like DR 2-105, also prohibited an attorney from limiting his practice. Id., at 195.

The Court stated:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protection of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the

> States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information can also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.
> . . . .
> . . . . Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest. . . . . (Emphasis added)

Id., at 203.

The Court further stated:

> But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech [listing areas of practice], in the absence of a finding that his

> **speech was misleading, does not meet these requirements. (Emphasis added.)**

Id., at 207.

Rule DR 2-105, as has been shown, is far more restrictive than the Missouri rule found unconstitutional in In re R.M.J. in prohibiting all public communications of fields of practice to non-certified lawyers. Like the Missouri rule, it limits public identification only to those areas approved for certification or designation by the Florida Bar. See, Schedule A, 414 So.2d 490, 503-504 (Fla. 1982).

That Petitioner was constitutionally permitted to send an unsolicited targeted letter to persons known to have need of legal services has been affirmed by the Supreme Court in Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988).

4. The speech concerned is lawful and not misleading.

The Supreme Court found that a prohibition of the public listing of areas of practice, in the absence of a finding that the speech was misleading, was unconstitutional. In re R.M.J., at 207.

In this case, the Petitioner was not charged with making a false or misleading statement. The referee made no findings that the statement was false or misleading. The uncontroverted evidence in the case adduced before the referee is that the statement was true: the Petitioner has twenty years of experience in the area of customs law and does practice in that area.

5. Scope of the State's Interest To Limit Speech.

In In re R.M.J., 455 U.S. 191 (1982), the listing of areas of practice was not found to be inherently misleading and entitled to protection under the First Amendment. Id., at 207-208.

The Supreme Court found that no substantial State interest was promoted by the prohibitions in the Missouri rule. Id., at 205. The same is true with respect to Florida's DR 2-105.

(a) Lack of Substantial State Interest and Breadth of Regulation.

While the State's interest in prohibiting false or untruthful representations that an attorney is certified, when he is not, is clear, there is no showing here that the State has a substantial interest in prohibiting all other public statements identifying, or limiting, areas of practice so long as the statements are true and not

misleading. In re R.M.J., 455 U.S., at 203. It stretches the imagination to find a truthful statement, as made here, as misleading.

The overall regulatory scheme also limits public access to information regarding fields of legal practice to only those areas approved by the Florida Bar for certification or designation. See, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Public identification of and access to practitioners in other areas of practice, such as Customs law, is effectively eliminated by the State's regulatory scheme.

No substantial State interest has been shown by the State in limiting non-certified attorneys solely to non-public identification of areas and

limitations of practice in listings with legal referral offices and announcements to other attorneys, while, at the same time, permitting certified attorneys to publicly identify their certified areas of practice; nor has the State shown that DR 2-105 is narrowly drawn and in proportion to any such interest, if it exists. In Re R.M.J., at 203; Central Hudson Gas & Electric, at 563-564.

> The value of commercial speech lies in its informational value to society. This concern focuses on the societal benefits to be derived from a communication. The greater the social utility and interest in communication, the lesser the State's ability to regulate it. See, Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

The Florida Bar v. Schreiber, 407 So.2d 595, 597 (Fla. 1981), reversed, 420 So.2d 599 (Fla. 1982), in light of In re R.M.J., 455 U.S. 191 (1982).

(b) Overbreadth of Regulation.

If a substantial State interest is found sufficient to justify restricting public communications by non-certified lawyers beyond those which are misleading or false, the State failed to regulate only to the extent necessary to further that interest; rather, the State categorically prohibited all forms of public communications by non-certified lawyers, including those communications held protected by the First and Fourteenth Amendments. This rule is not in proportion to the interest to be served. The excessive scope of the rule, if a substantial State interest is found, renders it unconstitutional. In re R.M.J., at 203; Hudson Gas & Electric, at 563-564.

B. DISCIPLINARY RULE 2-104(B)(1)(a) OF THE FLORIDA RULES OF PROFESSIONAL CONDUCT, ON ITS FACE AND AS APPLIED TO PETITIONER, VIOLATES THE FIRST AND

FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Disciplinary Rule 2-104(B)(1)(a) provided:

> (B) Written Communication.
>
> (1) Written commurications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:
>
> (a) Such written communications shall be plainly marked "Advertisement" on the face of the envelope and at the top of each page of the written communication in type no smaller than the largest type used in the written communication.

The disciplinary rule is to be applied in the light of Ethical Consideration 2-3, which stated:

> EC 2-3. Whether a lawyer acts properly is volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal

> problems. The advise is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights and obligations. Hence, advise is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not personally contact a nonclient for the purpose of being retained to represent him for compensation except as provided in DR 2-104.

Whether the State by rule can constitutionally require the marking of a communication as an "Advertisement" has not been directly addressed or decided by the United States Supreme Court.

The marking of a communication as "Advertisement" has been referred to in dicta by that court in Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977); In re R.M.J., 455 U.S. 191, at 206, n. 20 (1982); Shapero v. Kentucky Bar

Association, ___ U.S. ____, 108 S.Ct. 1916 (1988).

Customs law is a discrete area of federal law, governed by federal statutes and extensive regulations. 19 U.S.C. and 19 C.F.R. It embodies extensive administrative procedures and practices peculiar to that area of law. In addition to published case law in the area, practice in this area requires access to and familiarity with an extensive body of published rulings of the Treasury Department and the Customs Service as well as a large body of private letter rulings of the Customs Service.

A communication, such as the one here, which contains information concerning the action the recipient must take within a limited time period to protect his rights, if marked

"advertisement," is quite likely to be discarded by the addressee as junk mail.

A layman with a legal problem concerning Customs law, an area not approved by the Bar, was effectively precluded from conveniently locating a lawyer having experience in that field notwithstanding the duties imposed under the Ethical Canons of the Bar to inform and assist laymen to obtain competent legal representation. The duties imposed by the Ethical Canons were particularly compelling with regard to legal problems, such as Customs law, which are outside the mainstream of general legal expertise. The more esoteric the legal problem, the more compelling the need for qualified lawyers to reach out and offer laymen assistance and advise, albeit it unsolicited.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the Supreme Court of Florida, strike the disciplinary rules in question as unconstitutional and require the Supreme Court of Florida to publish a withdrawal of the public reprimand of the Petitioner.

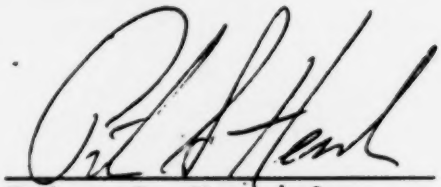
Respectfully submitted,

Peter S. Herrick
Attorney at Law
Pro Se
3520 Crystal View Court
Miami, Florida 33133
(305) 858-2332

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed by first class mail to the

Attorney General for the State of Florida, The Capitol, Tallahassee, Florida 32399-1050 and The Florida Bar, Patricia S. Etkin, Esq., Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 on the 2nd day of April, 1991.



Peter S. Herrick

SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 3, 1991

THE FLORIDA BAR, Complainant,

vs. CASE NO. 69,957

PETER S. HERRICK, Respondent.
****

The Motion for Rehearing, having been considered in light of the revised opinion, is hereby denied.

A True Copy JB
TEST:
cc: Hon. Lawrence L. Korda, Referee,
Peter S. Herrick, Esquire
Patricia S. Etkin, Esquire
Stephen Tabano, Esquire
John T. Berry, Esquire
Sid J. White
Clerk Supreme Court.

SUPREME COURT of FLORIDA

No. 69,957

THE FLORIDA BAR, Complainant,

vs.

PETER S. HERRICK, Respondent.

[October 11, 1991]

REVISED OPINION

PER CURIAM.

Peter S. Herrick petitioned this Court to review the report of the referee entered in disciplinary proceedings against him by The Florida Bar. We have jurisdiction pursuant to article V, section 15, of the Florida Constitution.

The disciplinary proceedings were initiated because Herrick mailed an

unsolicited letter to a couple upon learning that the couple had an interest in a vessel that had been seized by customs. The letter read as follows:

"Customs seized a 1981 30'2" Formula Thunderbird . . . and will forfeit the vessel unless a claim and bond for $2,500.00 is given to them by August 15, 1985. Our law firm specializes in Customs laws relating to vessel seizures. If you have any questions, please call."

The referee found that the letter was sent for the purpose of obtaining professional employment. Neither the letter nor the envelope was markded "Advertisement." The respondent is not ertified or designated in any area of law.

The referee recommended that Herrick be found guilty on three counts uner the then-applicable Code of Professonal Responsibility.1 [1 Footnote: The Code of Professional Responsibility has since been superceded by the Rules Regulating

the Florida Bar.] First, the referee recommended respondent be found guilty of violating Disciplinary Rule 2-104(B)(1)(a) of the Code of Professional Responsibility for the mailing of an unsolicited letter to a prospective client not marked as an advertisement. As to count II, he recommended that Herrick be found guilty of violating Disciplinary Rule 2-105 for stating that he was a specialist in custms law and thereby representing that he had competence or experience in a particular area of law. Under count III, the referee recommended that Herrick be found guilty of violating Disciplinary Rule 2-105 for publicly representing that he specialized and practiced in an area of law not recognized by the Florida Certification Plan or the Florida Designation Plan. The referee

recommended a public reprimand.

The United States Supreme Court has held that attorney advertising is a type of commercial speech that is protected by the first amendment. Bates v. State Bar of Arizona. 433 U.S. 350 (1977). However, false, deceptive, or misleading advertising remains subject to restraint. Id. at 383. The Court has noted that "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Id. Further, states not only may impose restraints to prevent misleading advertising but may also require limited supplementation, such as a warning or disclaimer, in order to assure that the consumer is not misled. Id. at 384.

Even when a communication is not misleading, a state retains some authority to regulate. However, a state must assert a substantial interest and may only interfere with speech in proportion to the interest served. In re R.M.J., 455 U.S. 191 (1982). The state rules may be no broader than reasonably necessary to prevent the perceived evil. Id.

First, we turn to Herrick's violation of Disciplinary Rule 2-104(B)(1)(a) [Footnote 2 Reads: (1) Written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:
(a) Such Written communications shall be plainly marked "Advertisement" on the face of the envelope and at the top of each page of the written communication in type no smaller than the largest type used in the written communication.]

for sending an unsolicited letter not marked as an advertisement. This

requirement does not violate Herrick's first amendment rights. We recognize that direct-mail solicitation does not pose the same risks as in-person solicitation. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). However, some risks are involved in mail solicitation by attorneys. As noted by the Supreme Court:

> [A] letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice.

Id. at 476 (citation omitted). While the Supreme Court has held that a state cannot justify an absolute prohibition on

this type of protected speech, a state "can regulate such abuses and minimize mistakes through far less restrictive and more precise means . . . ." Id. The Supreme Court has explicitly recognized that one such regulation is requiring a letter to bear a label identifying it as an advertisement. Id. at 477.

Therefore, we believe that Disciplinary Rule 2-104(B)(1)(a) is constitutional as one of these "less restrictive and more precise means" of regulation envisioned by the Supreme Court. The use of the term "Advertisement" printed on the letter acts to disclose the nature of the letter to the recipient. Its purpose is to assuage any concerns the recipient may have due to receiving a personalized letter from an attorney. Certainly in our increasingly litigious society, the

receipt of such a letter, personalized to one's own particular and perhaps pressing legal problem, could cause concern or confusion, especially if the recipient is generally unfamiliar with legal services.

Herrick argues that letters such as his provide important information to the public and are part of an attorney's legal duty to assist laymen in recognizing legal problems under Ethical Consideration 2-3. He states that such a letter which contains information concerning the action the recipient must take within a limited time period to protect his rights is likely to be discarded if marked "Advertisement." While this may be a legitimate concern, we think that the concerns with personalized mail solicitation outlined above present the greater risk and therefore justify the regulation.

Next, we turn to count II and Disciplinary Rule 2-105. Disciplinary Rule 2-105 reads as follows:

> A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as follows:
>
> (1) A lawyer who complies with the Florida Certification Plan . . . may inform the public and other lawyers of his certified areas of legal practice.
>
> (2) A lawyer who complies with the Florida Designation Plan . . . may inform the public and other lawyers of his designated areas of legal practice.
>
> (3) A lawyer may permit his name to be listed in lawyer referral offices according to the fields of law in which he will accept referrals.
>
> (4) A lawyer available to act as a consultant to or an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in local legal journals a dignified announcement of such availability, but the announcement shall not contain a representation

> of special competence or experience, except as permitted under DR 2-105(1) or (2) above. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in local legal journals.

Respondent argues that this rule violates the first and fourteenth amendments to the United States Constitution.

The Supreme Court has stated that a state may not place an absolute prohibition on certain types of potentially misleading information, such as a listing of areas of practice. In re R.M.J. 455 U.S. at 203. However, when the advertising is false, deceptive, or misleading, it is clearly subject to restraint. Bates, 433 U.S. at 383. The Florida Bar asserts that the statement that an attorney or firm specializes in a particular area of the law is misleading

to the general public because it could reasonably be interpreted to mean that the attorney or firm has competence or experience in a particular area of law. Further, the Bar argues that use of the term "specialize" could easily confuse and mislead the public as to the differences between the terms "certified," "designated," and "specialized."

The respondent argues that use of the term "specialize" is not misleading because Webster's New College Dictionary (1974) defines the term as "to concentrate one's efforts in a special activity or field." Respondent supports his argument by noting that Disciplinary Rule 2-105 has been replaced with the present rule 4-7.5, Rules Regulating the Florida Bar, which states that a "lawyer may communicate the fact that the lawyer

does or does not practice in particular fields of law."

We hold that the referee's finding that respondent violated Disciplinary Rule 2-105 does not violate respondent's first amendment rights. Both Disciplinary Rule 2-105 and Rule 4-7.5 prohibit a lawyer from stating or implying that the lawyer is a ''specialist" except when allowed under the Florida Certification Plan, the Florida Designation Plan, and in other limited situations.3

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3 Rule 4-7.5 of the Rules Regulating the Florida Bar reads:

> A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:
>
> (a) A lawyer admitted to engage in patent practice before the United States patent and trademark office may use the designation "patent attorney" or a substantially similar designation;
>
> (b) A lawyer engaged in

By prohibiting the general use of the term "specialist," the rule seeks to restrain advertising which can be false, deceptive, or misleading. By characterizing himself as a specialist, an attorney does more than merely indicate that he practices within a particular field. The term "specialist" carries with it the implication that the attorney has special competence and expertise in an area of law. We reject Herrick's argument that the word

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admiralty practice may use the designation "admiralty," "proctor in admiralty," or a substantially similar designation;

(c) A lawyer who complies with the Florida Certification Plan . . . or who is certified by a national group which has standards for certification substantially the same as those set out in [the Florida Certification Plan], may inform the public and other lawyers of his or her certified areas of legal practice; and

(d) A lawyer who complies with the Florida Designation Plan . . . may inform the public and other lawyers of his or her designated areas of legal practice.

"specialize" carries a different connotation than "specialist."

We recognize that Herrick's chosen area of practice, customs and forfeiture law, is not an area recognized under the Florida Certification Plan or the Florida Designation Plan. However, Herrick is not prevented from advertising that he practices in the area of customs law, but to permit Herrick to state that he is a specialist in customs law runs the risk of misleading the public into believing that he has been qualified under the Bar's designation or certification program. The state's interest here in preventing the public from being misled is strong and the regulation is narrowly drawn. This is not a case where the attorney truthfully advertises that he has been certified as having met the standards of a recognized

organization which tests the proficiency of lawyers in certain areas of the law. Peel v. Attorney Regulation & Disciplinary Comm'n. 110 S.Ct. 2281 (1990).

We conclude that the charges under count III were subsumed by count II. Herrick was not entitled to hold himself out as a specialist in any area of law regardless of whether it was recognized under the designation or certification program

We uphold the referee's findings with respect to counts I and II and find the respondent guilty of violating Disciplinary Rules 2-104(B)(1)(a) and 2-105. We further agree that a public reprimand is the appropriate discipline. Accordingly, it is the judgment of this Court that attorney Peter S. Herrick is publicly

reprimanded by publication of this opinion in the Southern Reporter. Herrick is ordered to pay the costs of this proceeding. Judgment is entered against him for costs of $694.46, for which sum let execution issue.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - The Florida Bar

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